Office-Supreme Court, U.S.
FILED
JUN 16 1962
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1962

No. [redacted] 186

SOLOMON DEHYDRATING COMPANY,
Incorporated, PETITIONER,

v.

DOLLY GUYTON, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

JOSEPH T. VOTAVA
Service Life Insurance Bldg., Omaha, Nebr.
KENNETH H. DRYDEN
Platte Valley Bank Bldg., Kearney, Nebr.
JOHN P. JENSEN
Platte Valley Bank Bldg., Kearney, Nebr.
CHARLES B. PAINE
108 North Locust St., Grand Island, Nebr.
BAYARD H. PAINE, JR.
108 North Locust St., Grand Island, Nebr.
Counsel for Petitioner

JOE CHRISTENSEN PRINTING, 1521 O Street, Lincoln 8, Nebr.

INDEX

Subject Index

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2
Statement of the Case	4
Summary	5
Argument	7
Point I	7
Point II	11
Point III	12
Point IV	14
Point V	16
Point VI	18
Point VII	23
Point IX	39
Conclusion	40
Appendix	42

Cases Cited

A-1 Finance Co. v. Nelson, 1957, 165 Neb. 296, 85 N. W. 2d 687	31
Acuff v. Schmit, 1956, 78 N. W. 2d 480	22
Anderson v. Carlson, 171 Neb. 741, 107 N. W. 2d 535	30
Ash v. Mullen, 1953, 261 P. 2d 118	21
Asher v. Texas, 1888, 128 U. S. 129, 32 L. Ed. 368, 9 S. Ct. 1	13
Aultman, Taylor & Co. v. Obermeyer, 1877, 6 Neb. 260	32
Bailey v. Wilson, 1959, 111 S. E. 106	22

Page

Bear Lake and River Water Works and Irrigation Co. v. Garland, 164 U. S. 1, 41 L. Ed. 327, 17 S. Ct. 7 10

Beck v. F. W. Woolworth Co., 1953, 111 F. Supp. 824 18

Bernhardt v. Polygraphic Co., 1956, 350 U. S. 198, 100 L. Ed. 199, 76 S. Ct. 273 14

Best v. Samuel Fox & Co., 1952, A. C. 716, 2 K. B. 639 21

Boley v. Griswold, 1874, 87 U. S. 486, 20 Wallace's Reports 486, 22 L. Ed. 375 10

Brown v. Georgia-Tennessee Coaches, 1953, 77 S. E. 2d 24 22

Burk v. Anderson, 1952, 109 N. E. 2d 407 19

City of Chadron v. Glover, 43 Neb. 732, 62 N. W. 62 25

Coastal Tank Lines, Inc. v. Canoles, 1955, 113 Atl. 2d 82 20

Continental Assurance Co. v. Tucker, 1955, D.C.S.D.N.Y., 138 F. Supp. 242 15

Cooney v. Moomaw, 1953, 109 F. Supp. 448 8, 13, 14, 17, 23, 24, 27, 28, 29, 30, 31, 33, 36

Deitz Lumber Co. v. Anderson, 116 Neb. 205, 216 N. W. 667 33

Deshotel v. A. T. & S. F. R. Co., 1958, 328 Pac. 2d 449 19

Dini v. Naiditch, 1960, 170 N. E. 2d 881 22

Drabbels v. Skelly Oil Co., December, 1951, 155 Neb. 17, 50 N. W. 2d 229 33

Dreamer v. Overlander, 122 Neb. 335, 240 N. W. 435 33

Elliot v. City of University Place, 102 Neb. 273, 166 N. W. 621 36

Page

Ellis v. Fallert, 1957, 307 P. 2d 283 23
Emerson v. Western Seed and Irrigation Co., 116 Neb. 180, 216 N. W. 297, 56 A. L. R. 327 27, 28, 30, 32
Eschenbach v. Benjamin, 1935, 263 N. W. 154 20, 33
Estate of Lucht, 139 Neb. 139, 296 N. W. 749 36
Feneff v. N.Y. Central & H.R. Ry. Co., 1909, 89 N. E. 436 20
Fidelity and Deposit Co. v. Lapidus, 136 Neb. 473, 286 N. W. 386 (1939) 29
Fidelity Trust Co. v. Field, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109 37
Franzen v. Zimmerman, 1953, 256 Pac. 2d 897 19
Fuller v. A. T. & T Co., 1937, 21 F. Supp. 741, affd. 99 F. 2d 620 20
Garrett v. Reno Oil Co., 1954, 271 S. W. 2d 764 21
Gordy v. Powell, 1957, 99 S. E. 2d 313 22
Hartman v. Cold Spring Granite Co., 1956, 77 N. W. 2d 651 20
Hillsborough Twp. v. Cromwell, 1945, 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358 14
Hinnant v. Tide Water Power Co., 1925, 126 S. E. 307 20
Hitaffer v. Argonne Co., 1950, 87 App. D. C. 57, 183 F. 2d 811, 23 A. L. R. 2d 1366 21, 22, 23, 24, 25, 27, 28, 29, 31
Hoekstra v. Hegeland, 1959, 98 N. W. 2d 669 22
Homolla v. Gluck, 1957, 8th Cir., 248 F. 2d 731 11, 16
Howard v. Virdigris Valley Electric Cooperative 1949, 207 P. 2d 784 21
Huddleston v. Dwyer, 322 U. S. 232, 64 S. Ct. 1015 40
In re Rosen, 1946, Dist. N.J., 66 F. Supp. 174, affd. 1946, 3rd Cir., 157 F. 2d 997 13

Page

In re White's Estate, 1948, 150 Neb. 167, 33 N. W. 2d 470 33
Juene v. Del E. Webb Const. Co., 1954, 269 Pac. 2d 723 19
Junghans v. Junghans, 1940, U.S.C.A.D.C., 112 F. 2d 212 10
Knierim v. Izzo, 1961, 174 N. E. 2d 157 22, 23
Kronenbitter v. Washburn Wire Co., 1958, 151 N. E. 2d 898 20
Krotter & Sailors v. Pease, 1956, 161 Neb. 774, 74 N. W. 2d 538 31
La Eace v. Cincinnati, N. & C. Ry. Co., 1952, 249 S. W. 2d 534 19
Larcocca v. American Chain & Cable Co., 1952, 92 Atl. 2d 311 20
Lockwood v. Wilson H. Lee Co., 1956, 128 A. 2d 330 19
Luther v. Maple, 1958, 8th Cir., 250 F. 2d 916 11, 16, 17, 23
L. V. N. Rd. Co., v. Hunsford, 1960, 116 S. E. 2d 232 22
Marmet v. Marmet, 160 Neb. 366, 70 N. W. 2d 301 (1955) 48 A. L. R. 2d 1315 29
Meredith v. Winter Haven, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9 13
Merryman v. Bourne, 1896, 76 U. S. 592, 19 L. Ed. 683 10
Missouri Pacific Transporation Co. v. Miller, 1957, 299 S. W. 2d 41 22
Mitton v. Granite State Fire Insurance Co., 1952, 10th Cir., 196 F. 2d 988 15
Montgomery v. Stephan (1960) 101 N. W. 2d 227 22
Nash v. M. & O R. Ry. Co., 1928, 116 So. 100, 59 A. L. R. 676 20

Page

National Bellas Hess v. Kalis, 1951, 8th Cir., 191 F. 2d 739 12
Nelson v. A. M. Lockett & Co., 1952, 243 P. 2d 719 21
Neuberg v. Bobowicz, 1960, 162 Atl. 2d 662 21
Nickel v. Hardware Mutual Casualty Co., 1955, 70 N. W. 2d 205 21
Omaha & R. V. Ry Co. v. Chollette, 41 Neb. 578, 59 N. W. 921 26, 36
O'Neill v. U. S., 1953, 92 App. D. C. 96, 202 F. 2d 366 22
Ripley v. Ewell, 1952, 61 So. 2d 420 19
Securties and Exchange Comm. v. Chenery Corp., 318 U. S. 80, 63 S. Ct. 454, 87 L. Ed. 626 15
Sheard v. Oregon Electric Ry. Co., 1931, 2 P. 2d 916 21
Simpson v. Poindexter, 1961, 133 So. 2d 286 20
Smith v. Johnson, 144 Neb. 769, 14 N. W. 2d 424 29
Smith v. Nicholas Bldg. Co., 1915, 112 N. E. 204 20
Smith v. United Construction Workers, 1960, 122 So. 2d 153 19
Smither and Co. v. Coles, 1957, ——App. D. C. —, 242 F. 2d 220 22
Snodgrass v. Cherry-Burrell Corp., 1960, 164 Atl. 2d 579 20
Stout v. Kansas City Terminal Ry. Co., 1913, 157 S. W. 1019 20
Sudderth v. National Lead Co., 1959, 5th Cir., 272 F. 2d 259 15
United States v. Flower, 1939, 1940, 8th Cir., 108 F. 2d 298 15
Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 61 S. Ct. 347 39

Page

Village of Brooten v. Cudahy Packing Co., 1961 8th Cir., 291 F. 2d 284 12
Werthan Bag Corp. v. Agnew, 1953, 6th Cir., 202 F. 2d 119 18
Western Auto Supply Co. v. Sullivan, 1954, 8th Cir., 210 F. 2d 36 16
Wright v. City of Omaha, 78 Neb. 124, 110 N. W. 754 26, 36
Yoder v. Nu-Enamel Corp., 1941, 8th Cir., 117 F. 2d 488 13
Yonner v. Adams, 1961, 167 Atl. 2d 717 23

Texts Cited

3 Am. Jur. page 489, Sec. 923 10
26 Am. Jur., Section 10, Pages 638, 639 33
27 Am. Jur. 91, Sec. 492 25
41 C. J. S., Section 15, Pag. 404 and Section 16, Page 413 33
41 C. J. S. 892, Sec. 401 25
Hughes, Federal Practice Jurisdiction and Procedure, Vol. 6, p. 279, Sec. 3737 13
Prosser, Law of Torts (2d Ed. 1955), Page 672 29
Restatement of the Law of Torts, Vol. 3, Section 695 21
Restatement of the Law of Torts, Section 869, Page 404 34

Statutes Cited

Section 28-449, R. R. S. 1943 33
Sections 30-809, 30-810, R. R. S. 1943 36

In The

Supreme Court of the United States

October Term, 1962

No. _____

SOLOMON DEHYDRATING COMPANY, Incorporated, PETITIONER,

v.

DOLLY GUYTON, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

---

JOSEPH T. VOTAVA
Service Life Insurance Bldg., Omaha, Nebr.
KENNETH H. DRYDEN
Platte Valley Bank Bldg., Kearney, Nebr.
JOHN P. JENSEN
Platte Valley Bank Bldg., Kearney, Nebr.
CHARLES B. PAINE
108 North Locust St., Grand Island, Nebr.
BAYARD H. PAINE, JR.
108 North Locust St., Grand Island, Nebr.
Counsel for Petitioner

Petitioner, Solomon Dehydrating Company, Inc., hereby respectfully petitions for a writ of certiorari to review

the order and decision of the United States Circuit Court of Appeals for the Eighth Circuit in Case No. 16,885, entered therein on May 4, 1962. This order reversed an order of the United States District Court for the District of Nebraska, which order sustained a Motion to Dismiss, filed by the defendant, Solomon Dehydrating Company, which ordered the action dismissed at plaintiff's cost.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit Court setting aside the order appealed from and remanding the cause for trial on the merits is found at — F. 2d —, and in the appendix to this Petition.

JURISDICTION

The order of Chief Judge Robinson of the United States District Court of the District of Nebraska, dismissing the plaintiff's action at plaintiff's cost, was entered on September 5, 1961 (R. 4). Notice of Appeal and Bond for Costs on Appeal were filed September 11, 1961 (R. 5). The opinion of the United States Circuit Court of Appeals for the Eighth Circuit was entered on May 4, 1962. Order staying issuance of the mandate pending filing of Petition for Certiorari was entered on May 21, 1962. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Is it proper for the Eighth Circuit Court to refuse to affirm an order of the Trial Court which dismissed

the plaintiff's petition merely because the Eighth Circuit Court assumed that the Trial Court erred instead of assuming that the Trial Court's order was correct?

2. Is it proper of the Eighth Circuit Court to place the burden of proof on the appellee instead of upon the appellant and to reverse when no facts justifying reversal appear in the record?

3. Where, in a diversity action, there is no controlling State Court decision, but there are two conflicting Federal Trial Court decisions as to what the State Court law is, is it proper for the Circuit Court to follow the earliest instead of the latest of such two conflicting decisions?

4. Is it proper for the Circuit Court to ignore the views of the Trial Court as to local law in a diversity action?

5. Is it proper, where there is no determination of local law, by the highest state court, in a diversity action, to refuse to follow the common law as declared by the majority of State Courts throughout the country?

6. Is it proper for the Eighth Circuit Court in a diversity action to decide an important question of state law in a manner that conflicts in many respects with the applicable law of the highest court of the State of Nebraska?

7. Is it proper for the Eighth Circuit Court in a diversity action to decide an important question of state law in a manner that conflicts with decisions of inferior Nebraska Courts?

8. In a diversity matter which is controlled by local law, where the immediate issue is whether or not the

petition stated a cause of action, and the identical question is pending before the highest court of the state, will trial in the Federal Court be delayed until the State Court has determined the issue?

STATEMENT OF THE CASE

This is a diversity action. Plaintiff filed her petition, and after setting forth jurisdictional facts, alleged that her husband was injured in an intersection accident when the bus driven by him collided with a truck driven by an employee of the defendant, Solomon Dehydrating Company, which is the petitioner for this writ. The wife, who was petitioner below, alleged that as a result of negligence of Solomon, who was defendant below, her husband was injured and that as a result of such injury she was deprived, for the remainder of her life, of the society, companionship, consortium and services of her husband (R. 1).

Solomon filed a motion to dismiss on the ground that the complant failed to state a claim upon which relief could be granted, and thereafter, after arguments and the submission of briefs, Judge Robinson, as Chief Judge of the United States Court of the District of Nebraska, sustained the motion to dismiss and dismissed the plaintiff's petition, stating he had determined the one proposition involved (R. 4).

SUMMARY OF REASONS FOR GRANTING THE WRIT

The reasons for granting this writ divide themselves into two groups:

I. *Reasons which relate to violations of important established appellate rules:* A federal appellate court is required to apply the facts as disclosed by the record according to universally accepted rules. This was not done here.

1. The burden of proof is always upon the appellant to establish error by the record. The record discloses no trial court error; therefore the reversal was improper.

2. An established rule of appellate review is the presumption of validity of the trial court's action; error is never to be presumed; yet in truth and in fact, error was here presumed through the technique of the appellate court making a presumption as to the effect of lack of a trial court opinion, which had no basis in fact, in law or in the record. To make this presumption effective the appellate court also had to presume that the trial court had considered two separate issues although the record establishes, and the trial court's order specificially stated, there was *only one* issue.

3. Another established rule of appellate review is that where there are two conflicting decisions by a court which creates applicable guiding precedents, then the latest decision, not the earliest decision, shall control. This rule was violated here. The earliest and not the latest of two conflicting decisions of the same court was followed.

4. It is universally established that a trial court's determination of a doubtful question of local law, es-

pecially where the trial judge is well versed in the local law; will be followed in a diversity action, unless it is demonstrably wrong. Here, without any showing that the trial court was wrong and without any consideration of the state law, the appellate court disregarded the trial court's determination.

II. *Reasons which relate to erroneous action by the appellate court where the federal court was controlled by state law but there has been no decision by the highest state court which was squarely determinative of the issue although there are decisions of inferior state courts which are in point, and the identical question is now pending before the highest State Court.* The issue here was whether a petition by a wife states a cause of action where the wife seeks to recover for loss of consortium when her husband was injured by reason of defendant's negligence.

1. Even if there were no guiding decisions by the Nebraska court, other Federal circuits hold that the federal appellate court should either look to the common law as declared by other state courts or should follow the more generally recognized state rule. Both common law and the large majority of state courts hold that a wife can not recover for loss of consortium in such a case as is here involved. The appellate court's action is contrary to the decisions of other circuit courts.

2. There are in Nebraska, many decisions of its highest court strongly indicating that the highest Nebraska court would deny recovery if such a situation was presented to it. The appellate court declined to consider these Nebraska authorities, failed even to discuss them, and is contrary to them.

3. There are, in Nebraska, at least two decisions of inferior courts in Nebraska which are squarely contrary to the ruling of the Eighth Circuit Court.

4. The identical question, here at issue, is now before the highest court of Nebraska and should soon be determined by that court. The Eighth Circuit Court ordered this case back to the Federal Trial Court for trial on the merits. As the Federal Court in this matter, is controlled by an intervening decision of the highest Court of Nebraska, it would be a useless and unnecessary act to try this case prior to final determination of the issue in Nebraska. Action withholding issuance of the mandate by the Eighth Circuit is required in the interest of justice.

For the reasons, above summarized, the writ should issue.

ARGUMENT

POINT I

This Decision of the Eighth Circuit Court Is in Conflict With Decisions of Other United States and Federal Courts on the Issue of the Presumption of Correctness of the Trial Court's Decision.

Erroneously the Eighth Circuit Court assumed that two separate issues had been presented to the Trial Court and that the Trial Court had determined two separate issues although there is nothing in the record to support such erroneous assumption and which erroneous assumption is squarely contrary to the record which states that the Trial Court considered only one proposition (R. 4). Basing its action on that erroneous

and factually incorrect assumption, the Eighth Circuit then referred back to the case of *Cooney* v. *Moomaw*, 1953, 109 F. Supp. 448, which had been decided by Trial Judge Donohoe under somewhat similar circumstances and where Judge Donohoe had considered similar matters relating to the right of a wife to maintain an action for loss of consortium due to the negligent injury to her husband. In his decision Judge Donohoe reached the conclusion if the matter were later presented to the Nebraska Supreme Court it would probably determine that the wife had such an action for loss of consortium. Judge Donohoe wrote an opinion setting forth his views on the matter.

It is obvious that the position of Judge Robinson in the present case and Judge Donohoe in the *Cooney* case are conflicting.

The Eighth Circuit Court (App. page 45), assumed that if Judge Robinson had intended to find differently than Judge Donohoe on this issue he would have written an opinion. Since he did not the Eighth Circuit Court presumed that the Trial Court here must have determined that the allegations of the plaintiff's petition were not sufficient to state a cause of action. The Eighth Circuit Court then proceeded to determine the allegations of the petition were sufficient and ordered reversal.

An examination of the petition discloses that it followed closely the language of the illustrative forms attached to the Federal Court Rules of Civil Procedure (See: Forms 9 and 10). The Motion to Dismiss, filed by defendant Solomon, followed paragraph 1 of Form 19 of such forms.

If the Eighth Circuit Court had observed the foregoing facts, we are certain that it would not have seriously believed for a single moment that the learned Chief Judge of the Trial Court had held that a pleading in approved form was bad. We are forced at once back to the proposition that the Chief Judge of the Trial Court did, in fact, rest his decision solely on the ground that local law in Nebraska did not permit a wife to recover for consortium in such a case as this. No other conclusion is tenable.

Note here the significant language of Chief Judge Robinson's order, which stated: "After careful consideration of the arguments of counsel, the briefs submitted, and the authorities *on this proposition involved*, I have concluded that the motion should be sustained." (R. 4) (Italics supplied).

It follows therefore that the *only* basis for reversal was the *presumption* by the Eighth Circuit Court that Chief Judge Robinson would *not* have decided in a manner that conflicted with Judge Donohoe on any issue of Nebraska law without writing a decision. (App. page 45).

The Eighth Circuit Court cited no authority in support of its extraordinary presumption and none exists so far as we know.

In effect, therefore, the Eighth Circuit Court reversed the Trial Judge solely on the strength of a *presumption of error* by the Trial Judge.

This action conflicts with all United States, Federal and State Court decisions we know of, bearing on this matter.

Merryman v. *Bourne*, 1896, 76 U. S. 592, at 600, 19 L. Ed. 683, where it is stated:

> "Error is not to be presumed. It must be affirmatively shown. Doubts are to be resolved in favor of the judgment rather than against it."

In *Boley* v. *Griswold*, 1874, 87 U. S. 486 at 488, 20 Wallace's Reports 486 at 488, 22 L. Ed. 375, it is stated:

> "In a court of error every presumption is in favor of the validity of the judgment brought under consideration. Error must appear affirmatively before there can be a reversal."

In *Junghans* v. *Junghans*, 1940, U.S.C.A.D.C., 112 F. 2d 212, it was held:

> Syl. 6. "Error is not to be presumed, but must be made affirmatively to appear by the party asserting it."

It is established that presumptions which are unfavorable to the order below, and for the purpose of reversing it, will not be indulged in. 3 Am. Jur. page 489, Sec. 923; *Bear Lake and River Water Works and Irrigation Co.* v. *Garland*, 164 U. S. 1, at 25, 41 L. Ed. 327, 17 S. Ct. 7.

The decision of the Eighth Circuit Court here which is based on a presumption which has no foundation or basis in the record, is in direct conflict with the above decisions.

The basic presumption of correctness of trial court action, in Federal appeals, is a fundamental matter. This conflict between the Eighth Circuit Court and the United States Supreme Court on an issue so vital as this requires issuance of the writ.

Even the most casual perusal of the Eighth Circuit Court opinion discloses the obvious fact that error in the order of Chief Judge Robinson was *not* affirmatively made to appear by Dolly Guyton. The action of Chief Judge Robinson with reference to the issue of consortium was fully supported and proper.

The applicable rule was well stated in *Luther* v. *Maple*, 1958, 8th Cir., 250 F. 2d 916, at syllabus 16 as follows:

> "If there can be a justifiable difference of opinion as to a doubtful question of state law in a diversity action, Court of Appeals on appeal will accept trial judge's ruling."

In the Court's opinion, at page 922, it stated that:

> "This court has consistently refused to attempt to outforecast, outpredict, or outguess a trial judge with respect to doubtful questions of state law when his views are not unsupported by authority nor demonstrably wrong."

The same rule was stated also in *Homolla* v. *Gluck*, 1957, 8th Cir., 248 F. 2d 731, at 733; and has been repeatedly laid down in many other Circuit Court decisions.

Because of this important error, the writ should be granted.

POINT II

This Decision of the Eighth Circuit Court Is in Conflict With the Decisions of Other Federal Court Decisions Which Hold that the Burden of Proof Is upon Appellant as It Relates to a Reversal of the Trial Court's Decisions.

It is well established by repeated Federal Court decisions that in a diversity suit controlled by local law

the Circuit Court will accept the views of the Trial Judge as to doubtful questions of local law and that in all such cases the burden of proof is on the appellant to establish error on the part of the trial court. The decisions are so numerous that no attempt will be made to list them here.

In *National Bellas Hess* v. *Kalis*, 1951, 8th Cir., 191 F. 2d 739, at 741, the court held that such a burden was "a peculiarly heavy one."

In *Village of Brooten* v. *Cudahy Packing Co.*, 1961, 8th Cir., 291 F. 2d 284, it was stated in Syl. 3 as follows:

> "Standard for review on doubtful questions of state law is *not* whether federal trial court reached *correct* conclusion but whether it reached *permissible* one, and *appellant's burden of showing misconception or misapplication of local law by trial court is a heavy one.*" (Italics supplied).

The burden of proof obviously was not met and the Circuit Court's decision is, therefore, in error.

POINT III

The Decision of the Eighth Circuit Court Is in Conflict With Other United States and Federal Court Decisions on the Issue of Whether, Where There Are Two Conflicting Federal Trial Court Decisions Determining State Law on a Local Issue and Where There Is No Determination By State Courts, the Earliest or Latest of such Two Conflicting Decisions Shall Control.

Despite the erroneous presumption (see page 7 hereof) of the Eighth Circuit Court that Chief Judge Robinson would not have reversed Judge Donohoe

without an opinion. Chief Judge Robinson's decision, in truth and in fact, conflicts squarely with that of Judge Donohoe in the case of *Cooney* v. *Moomaw*, 1953 109 F. Supp. 448.

In Hughes, Federal Practice Jurisdiction and Procedure, Vol. 6, p. 279, Sec. 3737, it is stated:

> "If the decisions from the highest court of the state conflict, the latest generally control (the latest decision presumptively being the right decision). . . ."

Many United States and Federal Court decisions are cited in Hughes in support of the above rule.

In *Meredith* v. *Winter Haven*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9, it was stated in West, Syl. No. 1, as follows:

> "Latest decision of state Supreme Court, on question of law involved in action in federal court, must be taken as controlling, unless it can be said with some assurance that the state Supreme Court will not follow that decision in the future."

To the same effect see Syl. 1 of *In re Rosen*, 1946, Dist. N.J., 66 F. Supp. 174, affd. 1946, 3rd Cir., 157 F. 2d 997, and Syl. 4 of *Yoder* v. *Nu-Enamel Corp.*, 1941, 8th Cir., 117 F. 2d 488.

See also *Asher* v. *Texas*, 1888, 128 U. S. 129, at 131, 132, 32 L. Ed. 368; 9 S. Ct. 1.

The Eighth Circuit Court failed even to comment on the likelihood of the Nebraska Supreme Court following or not following Chief Judge Robinson's decision.

It must, therefore, be presumed that Chief Judge Robinson's decision, being later that Judge Donohoe's

decision, is correct, for it certainly was the latest, and it certainly conflicted with Judge Donohoe's decision.

For this error, the writ should issue.

POINT IV

The Decision of the Eighth Circuit Court Is in Conflict With Other United States and Federal Court Decisions on the Issue as to the Degree of Respect to Which a Determination By a Trial Court Is Entitled To.

As heretofore pointed out at p. 9 hereof, the decision of the Eighth Circuit Court is actually, even though it may not have been so intended, most contemptuous of the competency of Chief Judge Robinson of the Trial Court by reason of its presumption that Chief Judge Robinson would have determined that allegations of a pleading which followed substantially the allegations of the approved illustrative forms were insufficient to state a cause of action.

We call attention also to the fact that Chief Judge Robinson was a life long Nebraska lawyer who had the benefit of contact with the Nebraska law and courts for many years before, and for eight years after, Judge Donohoe wrote his *Cooney* case decision.

Great deference is required to be paid, on matters of local law, to views of judges of those courts ". . . who are familiar with the intricacies and trends of local law and practice." See *Hillsborough Twp.* v. *Cromwell*, 1945, 326 U. S. 620, at 630, 66 S. Ct. 445, at 451, 90 L. Ed. 358; also *Bernhardt* v. *Polygraphic Co.*, 1956, 350 U. S. 198, 100 L. Ed. 199, 76 S. Ct. 273, at Syl. 8,

also *Mitton* v. *Granite State Fire Insurance Co.*, 1952, 10th Cir., 196 F. 2d 988.

In *Sudderth* v. *National Lead Co.*, 1959, 5th Cir., 272 F. 2d 259, it was stated in syllabus 4 as follows:

> "Great weight should be accorded to the decision of a trial judge on the local law of his own state in which he has had long experience."

None of the Eighth Circuit Court Judges was a Nebraska lawyer.

It may not be presumed that Chief Judge Robinson's lack of opinion denotes lack of consideration of consortium questions nor a decision to Dolly Guyton. See Syl. No. 1 of *Continental Assurance Co.* v. *Tucker*, 1955, D.C.S.D.N.Y., 138 F. Supp. 242.

Chief Judge Robinson's order was that the petition did not state a cause of action. His order, based on his finding that it did not state a cause of action, controls. Even if he had written an opinion it would not have controlled. See Syl. No. 3, *United States* v. *Flower*, 1939, 1940, 8th Cir., 108 F. 2d 298.

The test is whether Judge Robinson's order was correct regardless of what reason was given. Even if Chief Judge Robinson had written an opinion and had given wrong reasons, since the result was correct, the Eighth Circuit Court was here required to affirm the order below. *Securities and Exchange Comm.* v. *Chenery Corp.*, 318 U. S. 80 at 88, 63 S. Ct. 454 at 459, 87 L. Ed. 626.

For failure to give respect and consideration to Chief Judge Robinson, and his order, the writ should issue.

POINT V

The Decision of the Eighth Circuit Court Is in Conflict With Other United States and Federal Court Decisions as to Whether the Court of Appeals Should Reverse a Trial Judge Who Has Reached a Permissible Conclusion With Respect to a Doubtful Question of State Law in a Diversity Action.

The effect of the Eighth Circuit Court's order of reversal in this case is to directly hold that it will not approve the order of Chief Judge Robinson, which was based upon determination of Nebraska law, on a matter upon which the Nebraska Supreme Court has made no decision which is exactly in point.

This action by the Eighth Circuit Court is contrary to the law throughout the United States. We believe, except for the present Eighth Circuit Court decision, it is the universal rule of all United States and Federal Courts that an Appellate Court will not reverse a Trial Judge who has reached a permissible conclusion with respect to a doubtful question of law of a state, that such views of the Trial Judge will be accepted as correct, and that there will be no reversal, if the Trial Judge has reached a permissible decision, even though the Appellate Court believes the Trial Court's view is erroneous and would have otherwise decided the matter had it been sitting as a Trial Judge.

Reference is here made to only a few of the many courts which have established the above rules.

Western Auto Supply Co. v. *Sullivan*, 1954, 8th Cir., 210 F. 2d 36, at 43 and at Syl. 9.

Homollo v. *Gluck*; 1957, 8th Cir., 248 F. 2d 731, at 733, 734 and at Syl. 1.

Luther v. *Maple*, 1958, 8th Cir., 250 F. 2d 916, at 922 and at Syl. 16.

The Eighth Circuit Court (App. page 44) stated that Judge Donohoe, in *Cooney* v. *Moomaw*, 1953, U.S.D.C. Neb. 109 F. Supp. 448, as a Federal Trial Judge "could not authoritatively say with exactitude what the law of Nebraska was. He, nevertheless, in the absence of an expression from the Nebraska courts, had the right —and it was his duty—to express his views as to what the Supreme Court of Nebraska would hold if and when the question were presented to it."

In exactly the same manner, it was also the right and duty of Chief Judge Robinson, eight years after the *Cooney* case, when he was deciding what action should be taken by him as to the Motion to Dismiss, in this proceeding, to express his views as to what the Supreme Court of Nebraska would hold and to decide it upon the basis of the Nebraska laws and decisions in 1961, not as of 1953. This he squarely did by his order of dismissal.

The Eighth Circuit Court held that, in *Luther* v. *Maple*, 1958, 8th Cir., 250 F. 2d 916, it had considered Judge Donohoe's opinion in the *Cooney* case as representing a correct statement of the Nebraska law, but it is most significant that the Eighth Circuit Court in its present decision did not discuss Nebraska law in the light of the determination of Chief Judge Robinson, and it did *not* here determine that he had not reached a permissible conclusion with respect to the law of Nebraska relating to the issue of consortium. That Chief Judge Robinson's determination was a permissible one will, we believe, be conclusively demonstrated at Points VI and VII hereof.

It follows, therefore, that the order of the Eighth Circuit Court in this case must be reversed.

POINT VI

The Decision of the Eighth Circuit Court Is in Conflict With Other Federal Court Decisions By Failing to Follow the Federal Authorities Which Would Require that Court to Reject Wife's Right to Recover Consortium.

As shown hereafter (starting at p. 19), the great majority of the Courts hold that a wife is not authorized to recover damages for loss of consortium resulting from negligent injuries inflicted upon her husband.

Admittedly, the Supreme Court of Nebraska has not expressly decided this exact issue; however, see pages 23 and 25 hereof. Furthermore inferior Nebraska courts have decided this question squarely in favor of this petitioner. See page 37 hereof. Therefore, if it is necessary that the Nebraska inferior court decisions be disregarded nevertheless the Federal Courts are then required to look to the common law as declared by the majority of State courts.

In Syllabus 10 of *Werthan Bag Corp.* v. *Agnew*, 1953, 6th Cir., 202 F. 2d 119, at 120, the Court stated:

> "In diversity action, in which no Federal question was involved and the highest state court had not spoken on the subject in issue, Court of Appeals was bound to look to the common law as declared by the state courts of the country."

In syllabus 11 of *Beck* v. *F. W. Woolworth Co.*, 1953, 111 F. Supp. 824, at 825, it was held that in such a case as the present one, the Federal courts are:

> ". . . warranted in assuming that highest court of the state will follow the more generally recognized rule, or rules, of law * * *."

The great majority of the courts of the United States and England, and the Restatement of the Law of Torts, all hold that the wife has no right of recovery for loss of husband's consortium as a result of injury to him caused by a defendant's negligence. Chief Judge Robinson has good precedent for his order denying right of wife to recover for consortium.

The following is an illustrative, but not a complete, list of the authorities supporting the position of Chief Judge Robinson.

Alabama: *Smith* v. *United Construction Workers*, 1960, 122 So. 2d 153. (Change must come from Legislature).

Arizona: *Jeune* v. *Del E. Webb Const. Co.*, 1954, 269 Pac. 2d 723. (Wife had no such cause of action at common law.)

California: *Deshotel* v. *A. T. & S. F. R. Co.*, 1958, 328 Pac. 2d 449. (Change must come from Legislature).

Colorado: *Franzen* v. *Zimmerman*, 1953, 256 Pac. 2d 897. (Change must come from Legislature).

Connecticut: *Lockwood* v. *Wilson H. Lee Co.*, 1956, 128 A. 2d 330. (Recent cases from other jurisdictions failed to convince Court that it should change its long established position).

Florida: *Ripley* v. *Ewell*, 1952, 61 So. 2d 420. (Change must come from the legislature).

Indiana: *Burk* v. *Anderson*, 1952, 109 N. E. 2d 407. (Indiana statutes do not give right of action to wife).

Kentucky: *La Eace* v. *Cincinnati, N. & C. Ry. Co.*, 1952, 249 S. W. 2d 534. (After referring to the cases suporting the denial to the wife of her right to recovery, the court said, "We think the reasoning therein sound * * *.")

Maryland: *Coastal Tank Lines, Inc.* v. *Canoles*, 1955, 113 Atl. 2d 82. (Holding for wife would usurp the legislative prerogative.)

Massachusetts: *Feneff* v. *N.Y. Central & H.R. Ry. Co.*, 1909, 89 N. E. 436; *Fuller* v. *A. T. & T. Co.*, 1937, 21 F. Supp. 741, affd. 99 F.2d 620 (Wife can not maintain action for loss of husband's consortium as a result of injuries to him caused by defendant's negligence).

Minnesota: *Eschenbach* v. *Benjamin*, 1935, 263 N. W. 154. (Change should come from legislature). See also *Hartman* v. *Cold Spring Granite Co.*, 1956, 77 N. W. 2d 651.

Mississippi; *Nash* v. *M. & O R. Ry. Co.*, 1928, 116 So. 100, 59 A. L. R. 676. (Married Women's Act did not create new cause of action; any change up to legislature). See also *Simpson* v. *Poindexter*, 1961, 133 So. 2d 286.

Missouri: *Stout* v. *Kansas City Terminal Ry. Co.*, 1913, 157 S. W. 1019. (Married Women's Statutes do not grant wife right of recovery).

New Hampshire: *Snodgrass* v. *Cherry-Burrell Corp.*, 1960, 164 Atl. 2d 579. (Married women's statutes did not create new cause of action in wife to recover for loss of consortium.)

New Jersey: *Larocca* v. *American Chain & Cable Co.*, 1952, 92 Atl. 2d 811. (Married Women's Acts did not create new cause of action in wife).

New York: *Kronenbitter* v. *Washburn Wire Co.*, 1958, 151 N. E. 2d 898. (To grant right of recovery to wife would be contrary to both principle and precedent).

North Carolina: *Hinnant* v. *Tide Water Power Co.*, 1925, 126 S. E. 307. (Married Women's Acts did not give wife a cause of action).

Ohio: *Smith* v. *Nicholas Bldg. Co.*, 1915, 112 N. E.

204. (Wife can not maintain action for loss of husband's consortium as a result of injuries to him caused by defendant's negligence).

Oklahoma: *Howard* v. *Verdigris Valley Electric Co-operative* 1949, 207 P. 2d 784. (No right of action exists in wife in absence of statute. Married Women's Acts did not create such right). See also *Nelson* v. *A. M. Lockett & Co.*, 1952, 243 P. 2d 719. (The reasoning of the *Hitaffer* case does not support the conclusions reached.

Oregon: *Sheard* v. *Oregon Electric Ry Co.*, 1931, 2 P. 2d 916. (Married Women's Acts did not give wife a cause of action for consortium. Legislature of Oregon later adopted law giving wife such cause of action).

Pennsylvania: *Neuberg* v. *Bobowicz*, 1960, 162 Atl. 2d 662. (Change must come from legislature).

Texas: *Garrett* v. *Reno Oil Co.*, 1954, 271 S. W. 2d 764. (Change must come from legislature).

Washington: *Ash* v. *Mullen*, 1953, 261 P. 2d 118. (Married Women's Acts did not give wife a cause of action to recover for loss of consortium).

Wisconsin: *Nickel* v. *Hardware Mutual Casualty Co.*, 1955, 70 N. W. 2d 205. (Change should come from the legislature.)

England: *Best* v. *Samuel Fox & Co.*, 1952, A. C. 716, 2 K. B. 639.

Restatements: Restatement of the Law of Torts, Vol. 3, Section 695. (We believe that the Nebraska Courts most frequently follow the Restatements).

As opposed to the vast weight of authority in the United States which refuses to allow a wife in such cases as the present one to recover for loss of consortium there are only a few decisions to the contrary.

The first case to grant recovery (except for one early case, which was promptly reversed) was *Hitaffer* v. *Argonne Co.*, 1950, 87 App. D. C. 57, 183 F. 2d 811, 23 A. L. R. 2d 1366. The rule of this decision has been limited, however, by *O'Neill* v. *U. S.*, 1953, 92 App. D. C., 96, 202 F. 2d 366, and again by *Smither and Co.* v. *Coles*, 1957, ——App D.C. —, 242 F. 2d 220.

Arkansas followed the *Hitaffer* case by a close (4 to 3) decision in *Missouri Pacific Transportation Co.* v. *Miller*, 1957, 299 S. W. 2d 41.

Iowa followed the *Hitaffer* case by a close (5 to 4) decision in *Acuff* v. *Schmit*, 1956, 78 N. W. 2d 480.

Michigan followed the *Hitaffer* case by a close (4 to 3) decision in *Montgomery* v. *Stephan* (1960) 101 N. W. 2d 227.

South Dakota followed the *Hitaffer* case, by a close (3 to 2) decision, in the case of *Hoekstra* v. *Hegeland*, 1959, 98 N. W. 2d 669.

Georgia adopted the *Hitaffer* position but they promptly qualified its rule. See *Brown* v. *Georgia—Tennessee Coaches*, 1953, 77 S. E. 2d 24; *Bailey* v. *Wilson*, 1959, 111 S. E. 106 held wife can not recover injuries to her husband or for his loss of earning; and *L.V.N. Rd. Co.* v. *Hunsford*, 1960, 116 S. E. 2d 232, held wife of employee under Federal Employer's Liability Act cannot recover for loss of consortium. Also see *Gordy* v. *Powell*, 1957, 99 S. E. 2d 313 which permitted recovery under death statute but is contrary to the Nebraska cases. See page 36 herein. Illinois decided to follow the *Hitaffer* rule in the case of *Dini* v. *Naiditch*, 1960, 170 N. E. 2d 881; then promptly limited the general application of the rule in *Knierim* v. *Izzo*,

1961, 174 N. E. 2d. 157. Delaware also follows the *Hitaffer* rule. See *Yonner* v. *Adams;* 1961, 167 Atl. 2d 717. Oregon has adopted the same position by legislative action after the Oregon Courts had refused recovery. *Ellis* v. *Fallert*, 1957, 307 P. 2d 283. This obviously supports the contention of the petitioner herein. Legislation should be enacted by legislatures and not by Courts.

The highest court of Nebraska has never passed directly on this issue, although by dicta it has indicated there could be no recovery by the wife and at least two inferior Nebraska courts have held there could be no recovery by the wife. See page 37 hereof. However, one Trial Judge in *Cooney* v. *Moomaw*, 1953, 109 F. Supp. 488 "guessed" that Nebraska would follow the *Hitaffer* rule and this position was followed in *Luther* v. *Maple*, 8th Cir., 250 F. 2d 916. However, Chief Judge Robinson, in this proceeding, held in effect that Nebraska would follow the majority rule.

It is obvious that the great majority of Courts follow the position adopted by Chief Judge Robinson below. The writ therefore should issue.

POINT VII

The Decision of the Eighth Circuit Court Is in Error in that It Has Decided an Important Question of Nebraska Law in a Way Which Conflicts With Applicable Nebraska Law.

The highest, or Supreme, Court of Nebraska has not passed squarely on the issue at hand. However, the decisions of the Nebraska Supreme Court strongly indicate that the Supreme Court would deny the right of recovery by the wife. These authorities will be dis-

cussed in paragraphs a) to f) inclusive under this Point VII. Furthermore, two inferior courts have passed on this matter and hold that in Nebraska the wife has no right of recovery. These authorities will be considered in paragraph g) of this Point VII.

a) Trial Judge Donohoe, in *Cooney* v. *Moomaw*, 1953, 109 F. Supp. 448, considered the Nebraska law and reached the conclusion that in Nebraska an action should lie by the wife for loss of consortium of her husband resulting from negligent injuries to her husband.

Judge Donohoe, in that case, asserted at page 449, that ". . . an exhaustive examination of the reported Nebraska cases discloses that the Nebraska Courts have not been called up to decide. . . ." the precise issue above stated. The Judge admitted on the same page of his opinion that ". . . the numerical majority of American jurisdictions have held that no new rights were created by . . . . . " such Married Women's Act as Nebraska had adopted and therefore since she ". . . had no cause of action at Common Law for loss of her husband's consortium as a result of the defendant's negligence, she has none by virtue of the Married Women's Acts.", and he cited many cases which so held. The authorities cited under the preceding Point VI (at page 19) establish that such is still the view of the majority of American jurisdictions.

Judge Donohoe took Nebraska into the minority camp not on the strength of any Nebraska decisions, but on the strength of his personal conviction that the arguments of *Hitaffer* v. *Argonne*, 1950, 183 F. 2d 811, were sound, and that the Nebraska Court would concur in his views of their soundness if and when the issue was

ever presented to that court. The argument is patently weak for the vast majority of State Judges since *Hitaffer* have conclusively demonstrated that they do not concur in Judge Donohoe's view and Judge Donohoe gave no justifiable reason why the Nebraska Judges should follow *Hitaffer* and Donohoe's views rather than the views of the vastly larger number of their robed brethren who have adopted the opposite position.

Only three Nebraska authorities were cited by Judge Donohoe which bear at all on the issue at hand. Judge Donohoe cited *City of Chadron* v. *Glover*, 43 Neb. 732, 62 N. W. 62, to the effect that a wife in Nebraska may maintain an action in her own behalf for injuries resulting from a defendant's negligent acts. In that case a wife received personal injuries sustained by her as a result of a fall due to a defective sidewalk.

In the first place, that action was based upon a Nebraska Statute which imposed liability on a city for maintaining defective sidewalks. It therefore is no precedent at all.

In the second place, the vast majority of courts permit a wife to recover for her own injuries, see 41 C. J. S. 892, Sec. 401, and 27 Am. Jur. 91, Sec. 492, and most of these deny the wife the right to recover for loss of consortium due to negligent injuries to the husband. That weak contention has failed to persuade most United States judges and no reason is given why the Nebraska judges should be any more persuaded than the vast majority of their brethren.

In the third place, the case contains strong dicta *against* Judge Donohoe's contention. The Court, in its opinion, referring to earlier Nebraska cases, stated that

such earlier cases had held that a wife could ". . . maintain an action for personal injuries, recovering therein the damages *by her sustained as distinguished from any sustained by the husband.*" (italics supplied).

In other words, the Nebraska Court held that the wife could *not* recover because of damages or injuries negligently sustained by her husband.

Another case cited by Judge Donohoe was *Omaha & R. V. Ry Co.* v. *Chollette*, 41 Neb. 578, 59 N. W. 921. Syllabus 6 of that opinion states:

> "Therefore, the rule of liability in this case by the husband for injuries by his wife is to be determined *by the statute referred to.*" (Italics supplied.)

That case, as well as the *Wright* case next below, were cited by Judge Donohoe to show that in Nebraska the husband was entitled to recover for loss of his wife's consortium and therefore, he contended, consistency in law requires recognition of the converse. It was also cited to show that consortium in Nebraska included something more than services. While these conclusions for a number of reasons are highly questionable, they become totally invalid here, where recovery was based on a controlling statute, which deprives the cases of any meaning or validity, or force in the nonstatutory situation here involved. See page 36 hereof.

The third case cited by Judge Donohoe, to which reference was made above, was the case of *Wright* v. *City of Omaha*, 78 Neb. 124, 110 N. W. 754. Here liability was based on charter provision of the City of Omaha and therefore it is not applicable.

Not only do none of the Nebraska cases cited by

Judge Donohoe give support to his conclusions, but actually one of the cases contain dicta squarely to the contrary.

The other arguments of Judge Donohoe are typically *Hitaffer* contentions which are approved by a few Judges and condemned by the vast majority. The fact that Judge Donohoe may personally side with the few is *not* persuasive that the majority of the Judges of the Nebraska Supreme Court in the case of *Lewis* v. *Renter*, now pending before it, will side with Judge Donohoe and the small minority of State Judges, rather than with Chief Judge Robinson and the vast majority of State Judges.

The *Cooney* opinion suggests no valid reasons for its conclusion that it represents Nebraska law. Furthermore there are many good reasons why the *Cooney* conclusion probably does not represent the conclusion which the Nebraska Court will reach when this matter is presented to it. Logic, reason and authority are persuasive that the determination of Chief Judge Robinson correctly represents the probable Nebraska position. These other reasons will be set forth hereafter.

b) The Nebraska Supreme Court has evidenced a strong disposition to be bound by the decisions of the majority of State Courts on matters of local law where the State of Nebraska had not previously passed directly upon the question.

The case of *Emerson* v. *Western Seed and Irrigation* Co., 116 Neb. 180, 216 N. W. 297, 56 A. L. R. 327, was an action by a married woman against her husband's employer seeking a recovery for damages caused by her husband's negligence. The Trial Court dismissed the

action and the case was affirmed on appeal. The Nebraska Court referred to the many decisions from other states than Nebraska and then stated:

> "While purely a question of local law, the statutes of all the states have some similarity in language and clearly have a common objective in the removal of the disabilities of married women and the placing of both sexes in equality respecting their rights and the manner of enforcing them.
>
> ". . . An examination of the decisions of other jurisdictions discloses a great weight of opinion opposed to opening a field of litigation between spouses in tort actions by means of judicial interpretation and without unmistakable legislative action."

As shown in the preceding section (Point VI, at page 19) the great majority of state courts of this country are opposed to permitting a wife to recover in a Court action for loss of her husband's consortium where he was negligently injured by the defendant through the process of judicial interpretation. This *Emerson* case clearly establishes the incorrectness of the *Cooney* case, as a determination of the probable Nebraska law. Chief Judge Robinson's decision was correct.

c) The Nebraska Supreme Court has repeatedly stated that the Married Women's Acts did not restore full equality between husband and wife in the State of Nebraska.

Although the *Hitaffer* decision, and the cases which follow it, set forth a number of reasons for its support, it appears that probably the only basic justification of the decision that could exist would be that Married Women's Statutes, now adopted in all states of the

Union, with varying degrees of uniformity, have now eliminated all common law differences in the legal rights of husband and wife. The authorities heretofore cited established that this is not so in most states and is not so in Nebraska, and the fact that it is not so in Nebraska undercuts the basis of *Cooney*, and of all cases that follow *Hitaffer*, as valid authority or precedent in Nebraska.

In *Marmet* v. *Marmet*, 160 Neb. 366, 70 N. W. 2d 381 (1955) 48 A. L. R. 2d 1315, it is held that:

> Syl. 3. "The common-law disability of a married woman is still in force in this state, except as it has been abrogated by statute."

To same effect see *Fidelity and Deposit Co.* v. *Lapidus*, 136 Neb. 473, 286 N. W. 386 (1939).

See also *Smith* v. *Johnson*, 144 Neb. 769, 14 N. W. 2d 424.

All of the above three cases deal with the property of a married woman and her right to contract.

The primary object of the Married Women's Act was solely to free the wife from the husband's control of her propertyy. Prosser, Law of Torts (2d Ed. 1955), Page 672. The Nebraska Supreme Court has held that the Nebraska Married Women's Acts did not, in this State, even fully achieve that one single objective. Certainly the Nebraska Courts are most unlikely to switch now from the restricted position they have so frequently and so recently asserted, and now hold, as Judge Donohoe "guesses", that not only is the Married Women's disability entirely removed by the statutes, but miraculous to relate, those very same statutes have created for her a cause of action which Judge Donohoe

(Page 449 of *Cooney* Opinion) admitted she did not have at Common Law.

Not only is Nebraska most unlikely to be in the forefront of the new advance, as implied by Judge Donohoe, but, quite to the contrary, it appears most likely to be one of the last of the States to reverse its position.

Take for example the related situation which deals with the right of a wife to recover against her husband and against her husband's employer for damages caused by her husband's negligence. The Nebraska Court held in *Emerson v. Western Seed and Irrigation Company*, 116 Neb. 180, 216 N. W. 297, 56 A. L. R. 327, that the Married Women's Acts of Nebraska did not permit a wife to maintain suit in either of the two above situations. However, Prosser, above cited, at pages 678 and 679, listed Nebraska with the minority and reported that majority of Courts, at least so far as the employer is concerned, would have permitted recovery.

It is most unrealistic to suggest that Nebraska would now adopt the views of Judge Donohoe in the *Cooney* case when in related situations they refused to move in that direction.

d) The Nebraska Supreme Court has repeatedly held that it should not, and will not, judicially legislate, and that any change should come from the legislature. The case of *Emerson* v. *Western Seed and Irrigation Company*, cited on pages 27 and 28 hereof, is a good example of such a determination. See also the authorities cited in subdivision (e) hereof, starting at page 32.

The very recent case of *Anderson* v. *Carlson*, 171 Neb. 741, 107 N. W. 2d 535, was decided in February

of 1961. The Court, at page 745 of its opinion, stated, "It is not the function of the Courts to legislate."

The Nebraska Supreme Court has held on many occasions that even though statutes are remedial and should be liberally construed, the Nebraska Supreme Court has never arrogated to itself the right to put a construction on the law that would to all intents and purposes amount to an amendment of it. The Court has held that it must accept any Nebraska statute as they find it and will not read into any statute anything which is not there. See *Krotter & Sailors* v *Pease*, 1956, 161 Neb. 774, 74 N. W. 2d 538, and *A-1 Finance Co.* v. *Nelson*, October, 1957, 165 Neb. 296, 85 N. W. 2d 687.

The application of the foregoing rule has been shown at page 28 hereof. The Married Women's Acts of Nebraska have not eliminated all legal differences between husband and wife, and the Nebraska Supreme Court will not read into those statutes that which is not there nor take upon itself judicial legislation, such as was done in the case of the *Hitaffer* v. *Argonne* case, supra, at pages 22 and 24. Judge Donohoe's decision, in the *Cooney* case, supra, page 24, may constitute a persuasive argument for one who believes in the rule of judicial legislation. But the *Cooney* case has no validity in Nebraska, nor could it possibly be adopted in Nebraska, so long as the Nebraska Supreme Court continues to follow its policy decisions which it has so often reiterated. All of these Nebraska decisions, above referred to, were either intentionally ignored, or unintentionally overlooked, by Judge Donohoe, but regardless of which, they eliminate the likelihood that the Nebraska Court will ever adopt Judge Donohoe's view and they make certain that Chief Judge Robinson's

position was correct and that the Eighth Circuit Court has now erred.

(e) The Nebraska Supreme Court has repeatedly taken the position that basic legal changes must come through acts of legislature, and not by way of judicial legislation.

One such instance was found in the case of *Emerson v. Western Seed and Irrigation Company*, heretofore cited at page 27. There it was contended before court that the old Common Law rule that a wife could not sue her husband for damage had been changed by the Nebraska Married Women's Acts. The Court refused to accept this contention and stated: "If this situation is to be disturbed, the change should come by legislation.

The Nebraska Supreme Court has on a number of occasions held that the common law disabilities of married women in respect to the rights of husband and wife are still in force in Nebraska excepting only to the extent they have been modified by legislature. Certain of these disabilities, with reference to contract and property matters have heretofore been cited at page 29 hereof. See also the case of *Aultman, Taylor & Co. v. Obermeyer*, 1877, 6 Neb. 260. There is no statute in Nebraska which grants to a married woman the cause of action for loss of consortium due to damage to her husband.

Under Nebraska law there are important differences between the obligation of a husband to his wife and the obligation of a wife to her husband. For example, in Nebraska it is a misdemeanor for a husband to willfully

fail to support his wife for a period of less than 30 days and a felony for a husband to fail to support his wife for a period of 30 days or more. Section 28-449, R. R. S. 1943. There is no reciprocal criminal liability in Nebraska for failure of wife to support her husband. See also *Eschenbach* v. *Benjamin*, Minn. 1935, 263 N. W. 154.

Under common law the husband was liable for his wife's necessaries including the expenses of her last illness and burial. *In re White's Estate*, 1948, 150 Neb. 167, 33 N. W. 2d 470. Again there was no reciprocal obligation on the part of the wife.

Under common law a husband has the obligation to support his wife, but the wife had no corresponding obligation to support her husband. 41 C. J. S. Section 15, Page 404, and Section 16, Page 413.

The husband is the head of the family in Nebraska. As such, among other things, he has the authority to determine the matrimonial and family domicile, direct the family's affairs and the wife is under duty to submit to the reasonable government of the family by the husband. 26 Am. Jur., Section 10, Pages 638, 639 and the Nebraska cases there cited.

Even a Nebraska statute making a married woman liable for debts contracted by her husband for family necessaries imposes no personal liability on her for such support. See *Dreamer* v. *Overlander*, 122 Neb. 335, 240 N. W. 435, and *Deitz Lumber Co.* v. *Anderson*, 116 Neb. 205, 216 N. W. 667.

The Nebraska Supreme Court has repeatedly demonstrated that in the field of family relations it will

follow common law and that it will not extend or modify the old common law in such field except as authorized and justified by express legislative enactment.

In a case decided about the time of the case of *Cooney* v. *Moomaw* supra, but obviously overlooked by Judge Donohoe when he wrote that decision, was the interesting case of *Drabbels* v. *Skelly Oil Co.*, December, 1951, 155 Neb. 17, 50 N. W. 2d 229. This was an action brought by an administrator under the Nebraska Death Statute for the wrongful death of a child born before birth. The defendent filed a demurer which was sustained. On appeal, the decision of the District Court was affirmed. The law of the case is stated in syllabus 1 as follows: "A child born dead cannot maintain an action at common law for injuries received by it before its birth." The Court, in its opinion, cited the Restatement of the Law of Torts, Section 869, Page 404, this being but one of the many instances where the Nebraska Supreme Court has consistently relied upon and followed the Restatements of the Law.

The Supreme Court cited at page 21 of its opinion many cases in support and then added at page 22: "We adhere to the rule that an unborn child is a part of the mother until birth and, as such, has no juridical existence." The Court then continues at Page 23 and 24 of its opinion:

> "Since no cause of action accrued to the child born dead, for injuries received before birth, none survived to the personal representative under the wrongful death statute. It would appear, therefore, that an action of this character may not be

maintained unless and until the right to bring it is afforded by legislative enactment."

In Nebraska, there is no basic difference between the rights which a child has with reference to its parents and the rights which a wife has as to her husband, excepting only the one which arises out of the marital relationship. All of the rights as to support, services, companionship, society are identical. There is no logical reason for granting to the wife a right to recover damages for the negligent loss of her husband's support, society, companionship, and services, and to deny to a child the same right to recover damages for the negligent loss of its parents' support, companionship, society and services. So far as logic is concerned, and so far as common law is concerned, the right to recover in each instance is identical. Yet here in Nebraska, in the *Drabbels* case, above cited at page 34, the Supreme Court has expressly denied the right of recovery on behalf of an unborn child for the reason that such child could not maintain an action at common law and held no such action may be maintained in Nebraska unless and until the right to bring it has been afforded by legislative enactment. Although this case obviously is not identical in nature to the case at bar, and did not involve consortium for a child, there is every reason to suppose that Nebraska Supreme Court would reach identically the same result if an action were brought on behalf of a wife for loss of her consortium rights.

Other authorities relating to the necessity for legislative action are cited in subsection (d) hereof starting at page 30.

It is highly significant that Nebraska has repeatedly followed the identical rules in comparable situations,

which have been followed by practically every one of the courts that have decided with the majority. There appears to be *no* reasonable basis for contending that Nebraska would probably follow the *Cooney* rule.

Chief Judge Robinson was correct. Nebraska law points strongly and vigorously in the direction of a denial of the right of a wife to sue for loss of consortium due to negligent injuries to her husband. The Eighth Circuit Court erred in reversing the case.

f) The Nebraska Supreme Court limits right of recovery for consortium.

As set forth in subdivision (a) above (Page 24) Judge Donohoe, in the *Cooney* v. *Moomaw Case*, supra, cited the *Chollette* and *Wright* cases and stated that they "seem" to recognize the right of a husband to recover for loss of his wife's consortium. The use of the word "seem" is proper, for there is considerable doubt that the cases actually so hold, especially in view of the statutes involved.

Other Nebraska cases have also greatly restricted or eliminated any right to recover for consortium. The cases of *Estate of Lucht*, 139 Neb. 139, 296 N. W. 749 and *Elliot* v. *City of University Place*, 102 Neb. 273, 166 N. W. 621, were actions seeking recovery under the Nebraska Death Act (R. R. S., 1943, Sec. 30-809, 810). The statute merely authorized a person to "recover damages." The Nebraska Supreme Court held that pain, anguish, loss of society, and companionship were not proper elements of damage.

g) It is the duty of the Federal Courts, where the State law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State.

In *Fidelity Trust Co.* v. *Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109, it is stated at syllabus No. 2:

> "An intermediate state court in declaring and applying the state law is acting as an organ of the State, and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."

In the opinion, at page 179, the Court stated, "* * and we think that the decisions of the Court of Chancery are entitled to like respect as announcing the law of the State."

On June 13, 1962, long after the decision of the Eighth Circuit Court in this matter and even after this Petition was first sent to the printers for printing, counsel for Petitioner, Solomon, herein, learned for the first time of the case of *Alyce M. Lewis* v. *Eileen E. Renter, Executrix of the Estate of Raymond F. Renter, Deceased.* This action was originally commenced in the County Court of Dodge County, Nebraska, as case No. 9882, wherein, on July 23, 1960 Alyce M. Lewis, represented by Schrempp & Lathrop and Henry C. Rosenthal, Jr. (who are counsel for Respondent in this present proceeding) filed a claim for damages for loss of consortium in the Estate of *Raymond F. Renter, Deceased.* The claim was demurred to by the Estate for the reason the claim failed to state a cause of action. The Probate Court denied the claim for damages on January 6, 1961.

Appeal was taken by Alyce M. Lewis from the County or Probate Court of Dodge County, Nebraska to the District Court of Dodge County, Nebraska.

Appropriate pleadings were filed in that Court raising the issue of damages for loss of consortium, the pleading on behalf of Lewis there being similar to the pleadings filed in the case, by the same counsel, on behalf of Dolly Guyton.

On June 6, 1961 District Judge Robert L. Flory, sustained the demurrer to the Petition for Damages on the ground that the petition did not state a cause of action; among other things the Judge stated:

> "I was particularly impressed * * * that the correct modern view should be that neither spouse should have a cause of action in this kind of case. I do not think it feasible to measure the damages of and to compensate for all life's misfortunes and anguishes but believe the compensible area at common law should be confined to the injured person and not broadened to include others upon whom the injury may have had an impact. Such a broadening could conceivably include children and other relatives and even extend to non-relatives."

Notice of appeal from the action of the Nebraska District Court was taken and the appeal was filed in the Nebraska Supreme Court on July 3, 1961, and the case is docketed as case No. 35,110. After a series of extensions, the appellant, Alyce M. Lewis, through her counsel, who are also counsel for Dolly Guyton herein, filed her brief, on appeal on May 7, 1962, and by stipulation of the parties, brief day for appellee is fixed at August 1, 1962. The case will undoubtedly be heard by the Supreme Court of Nebraska early in the fall of this year.

Under the above cited decision of this United States Supreme Court, Chief Judge Robinson's order was correct and the action of the Eighth Circuit Court was in error. The writ should issue forthwith.

Point VIII

As the Federal Courts Must Determine this Case According to Controlling State Law, It Should Not Be Remanded for Trial on Merits Until After the Supreme Court of Nebraska Has Determined the Question in the Matter Now Before It, and Then Only If Such Determination Finds That a Cause of Action Exists.

It was held in *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 61 S. Ct. 347:

> "* * * that, until such time as a case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controling decision of the highest court of the state."

The issue as to whether the original petition filed by Dolly Guyton states a good cause of action will probably be determined within the next few months by the highest court of Nebraska.

The order of the Eighth Circuit Court below was that this case be remanded to the Federal District Court for trial on the merits. We submit that the case, through trial and subsequent appeal, will continue to be sub judice long after the issue here involved has been finally determined by the Nebraska Supreme Court, at which time such determination will control the Federal Courts in this matter. No trial should be had until after the Nebraska Supreme Court has spoken.

Pursuant to *Huddleston* v. *Dwyer*, 322 U. S. 232, 64 S. Ct. 1015, the writ should issue now, and, upon hearing, an order should be entered vacating the judgment below and remanding the cause to the Eighth Circuit court with directions that it reconsider its decision in the light of decisions by the various courts of Nebraska.

CONCLUSION

There are four basic reasons why this writ should be granted: (1) The Eighth Circuit Court has decided very important matters relating to burden of proof and presumptions in a manner that is contrary to a multitude of United States and Federal Court decisions; (2) the Eighth Circuit Court has decided a very important State question in a way that is in direct conflict with applicable state law; (3) the decision of the Eighth Circuit Court is directly contrary to the decisions of a County Court in Nebraska and of a District Court in Nebraska; and (4) this identical question is now pending before, and soon to be decided by, the highest court in Nebraska, and this federal case will be bound thereby and should not be tried prior to a determination of this issue by the Supreme Court of Nebraska.

These issues are not only of great importance to the litigants here but to many other persons. A proper determination should be made by the United States Supreme Court.

This Court should grant certiorari and the judgment should be reversed. In any event, the writ in the interest of justice should be issued so that the mandate may be held up until the Supreme Court of Nebraska has decided this issue or in the alternative the matter

should be remanded to the Eighth Circuit with directions that it reconsider its decision in the light of the recently disclosed developments in the law of Nebraska. This is particularly essential in view of the fact that Respondents' counsel here are counsel in the other Nebraska cases but did not make the facts as to these inferior court decisions known to counsel for Petitioners herein, and apparently did not make them known to Federal and District Courts here concerned with these matters.

Respectfully Submitted,

JOSEPH T. VOTAVA
Service Life Insurance Bldg.
Omaha, Nebrasa
KENNETH H. DRYDEN
Platte Valley Bank Bldg.
Kearney, Nebraska
JOHN P. JENSEN
Platte Valley Bank Bldg.
Kearney, Nebraska
CHARLES B. PAINE
108 North Locust Street
Grand Island, Nebraska
BAYARD H. PAINE, JR.
108 North Locust Street
Grand Island, Nebraska
Council for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16,885.

Dolly Guyton, Appellant,

vs.

Solomon Dehydrating Company, Incorporated, Appellee.

Appeal from the United States District Court for the District of Nebraska.

[May 4, 1962.]

Before, VOGEL and RIDGE, Circuit Judges, and DEVITT, District Judge.

VOGEL, Circuit Judge.

Dolly Guyton, plaintiff-appellant, brought this action against Solomon Dehydrating Company, Inc., defendant-appellee, to recover money damages because of her loss of the right to her husband's society, companionship, consortium and services. The husband, Clarence R. Guyton, was seriously injured as the result of an accident between a Greyhound Bus which he was driving and a truck driven by an employee of the Solomon Dehydrating Company, Inc. See *Solomon Dehydrating Co.* v. *Guyton*, 8 Cir., 1961, 294 F.2d 439, certiorari denied 368 U.S. 929, 82 S.Ct. 366, 7 L.Ed.2d 192. Plaintiff's complaint herein with reference to liability alleged:

> "That on July 29, 1959, the plaintiff's husband, was operating a Greyhound bus as a driver; that he was operating this bus on highway 30; that as he

approached an intersection with a county road about 3.5 miles east of Kearney, Nebraska, a 1959 truck, driven by a driver of the defendant, Solomon Dehydrating Company, Inc., within the course and scope of his employment with the defendant, carelessly, negligently and recklessly collided with the bus which plaintiff's husband was operating, causing plaintiff's husband injuries and damages hereinafter set forth."

Plaintiff, after setting forth in detail the injuries sustained by her husband and the disabilities resulting therefrom, then alleged that by reason thereof she

"• • • lost her right to her husband's society and companionship and consortium for a period of 9 months; that this loss was directly caused by the negligence of the defendant; that the plaintiff has been damaged in this respect in the amount of $5,000.00.

"That as a direct and proximate result of the negligence of the defendant and the resulting collision the plaintiff will in the future suffer great and irreparable loss in that she will be deprived for the remainder of her life, of the society, companionship, consortium and services of her husband, for all of which loss, deprivation, injury and damage plaintiff claims damage in the amount of $20,000.00."

To this complaint the defendant filed a general motion to dismiss

"• • •for the reason that the complaint fails to state a claim upon which relief can be granted."

The trial court granted the motion dismissing plaintiff's complaint but wrote no opinion and failed to indicate the reasons or grounds therefor.

In appealing from such dismissal, counsel for the plaintiff, not being certain as to the basis therefor, suggest

that two possible facets may have been raised: (1) That the manner of pleading liability on the part of the defendant was thought to be inadequate or insufficient; and (2) that a wife's claim for loss of consortium was thought not to be enforceable under the laws of Nebraska. With reference to the latter point, however, counsel direct attention to the fact that, the Supreme Court of Nebraska not having spoken on the subject, the late Chief Judge Donohoe in *Cooney* v. *Moomaw*, D.C. Neb., 1953, 109 F.Supp. 448, 450, after an exhaustive review and analysis of the law of Nebraska, concluded that:

> "* * * consistency within the state would seem to indicate that Nebraska would allow the wife, as well as the husband, a right of action for loss of consortium."

Of course, Judge Donohoe, as a federal judge, could not authoritatively say with exactitude what the law of Nebraska was. He, nevertheless, in the absence of an expression from the Nebraska courts, had the right—and it was his duty—to express his views as to what the Supreme Court of Nebraska would hold if and when the legal question were presented to it. Judge Donohoe's statements in *Cooney* v. *Moomaw*, supra, have been considered as representing a correct statement of the law of Nebraska. This court followed such holding and, speaking through Judge John Sanborn in *Luther* v. *Maple*, 8 Cir., 1958, 250 F.2d 916, said at page 922:

> "The contention of the defendants that the trial court erred in instructing the jury that Donna Maple could be awarded damages for loss of consortium, because under Nebraska law a wife may not recover for such loss attributable to injuries negligently inflicted upon her husband, raises a doubtful question of the law of that State which can

definitely be decided only by the Supreme Court of Nebraska. Concededly, that court has not yet ruled upon the question. There is respectable authority both ways. See *Hitaffer* v. *Argonne Co., Inc.*, 87 U.S.App.D.C. 57, 183 F.2d 811, 23 A.L.R.2d 1366, and the Annotation following that case, on pages 1378-1397 of 23 A.L.R.2d. The late Judge Donohoe, of the United States District Court for the District of Nebraska, was of the opinion that under Nebraska law a wife could recover damages for loss of consortium in a case such as the instant one. *Cooney* v. *Moomaw*, D.C.D.Neb., 109 F.Supp. 448, 450. Obviously no one can predict with an assurance how the question will ultimately be decided by the Supreme Court of Nebraska."

Counsel argue, and we think with considerable force, that in view of *Cooney* and its having been followed by *Luther*, the trial judge in the instant case would most probably not have overruled his predecessor's opinion in *Cooney* without specifically so stating, and they therefore conclude that he must have based his order of dismissal upon an erroneous assumption that the allegation as to liability—in other words, facet No. 1—was inadequate and insufficient.

The adequacy of the complaint as to liability for the accident presents no difficult problem. Rule 8 of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides, in addition to the jurisdictional allegations which are present here, that the pleading contain

> "(a)(2) a short and plain statement of the claim showing that the pleader is entitled to relief"

and further provides

> "(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

Plaintiff's allegations, supra, meet the requirements of the rule. Many cases so hold. In *Thomason* v. *Hospital T.V. Rentals, Inc.*, 8 Cir., 1959, 272 F.2d 263, we said at page 266:

> "The attitude of this Court toward attempts to terminate litigation, believed to be without merit, by dismissing a complaint for insufficiency of statement has been adequately stated in *Publicity Building Realty Corp.* v. *Hannegan*, 8 Cir., 139 F.2d 583, 586-587, and restated in *Lada* v. *Wilkie*, [8 Cir., 1957, 250 F.2d 211] supra, at pages 212-213 of 250 F.2d. No matter how reasonably it may be surmised or predicted that a plaintiff will be unable to establish on a trial the claim stated in his complaint or to obtain any relief, he is, nevertheless, entitled to make the attempt unless it appears beyond doubt that he can prove no set of facts in support of his claim which would entitle him to any relief. *Conley* v. *Gibson*, [1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80] supra, at pages 45-48 of 355 U.S., at pages 101-103 of 78 S.Ct."

See *Dennis* v. *Village of Tonka Bay*, 8 Cir., 1945, 151 F.2d 411, 412-413, and *Smedley* v. *Guy F. Atkinson Co.*, D.C.Neb., 1951, 12 F.R.D. 355, 356, and cases cited therein. We hold here that the allegations of the complaint were sufficient on the question of liability.

As neither suggested facet of the motion would have been sufficient to support dismissal, it must be reversed. Plaintiff here should be allowed to show, if she can, that she sustained injury or damage for which recovery could be had under the law of Nebraska. The order appealed from is set aside and the cause remanded for trial on the merits.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.